Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
CMRS MARKET COMPETITION	)	WT Docket No. 07-71

COMMENTS OF TRACFONE WIRELESS, INC.

TracFone Wireless, Inc. (TracFone) hereby comments on the state of competition in the Commercial Mobile Radio Service (CMRS) market. By public notice issued April 6, 2007, the Commission announced that it was inviting public comment on the state of competition in the CMRS industry sector to assist it in preparation of its annual report to Congress on the competitiveness of the CMRS market, as required by Section 332(c)(1)(C) of the Communications Act.[1]

TracFone is a CMRS provider which offers service throughout the United States. Several aspects of TracFone's CMRS business differentiate it from other CMRS providers. First, its services are offered only on a prepaid "pay-as-you-go" basis. There are no bills rendered for service since the service is paid for in full in advance. Consumers may purchase TracFone handsets from retail locations throughout the United States as well as from TracFone directly via its Internet website (www.tracfone.com). Consumers may also purchase TracFone's prepaid airtime products, either at retail outlets or directly from TracFone. Because there are no customer contracts, long term commitment periods, early termination penalties, or credit checks, TracFone services are used widely by low volume users of wireless service. Many TracFone users are lower

[1] Public Notice – WTB Seeks Comment on CMRS Market Competition (WTB Docket No. 07-71), DA 07-1652, released April 6,2007.

income. TracFone services tend to be especially popular with students, the elderly, military personnel, recent immigrants, and others who desire the convenience and security of readily available wireless service but who cannot qualify for traditional post-paid plans or who choose not to enter into such arrangements, and who simply cannot afford the more costly post-paid CMRS plans available.

TracFone also differs from other CMRS providers in that it owns and operates no network facilities. Rather, it provides service through wholesale arrangements which it has negotiated with numerous wireless network operators. Although much of TracFone service is acquired from several of the nation's largest wireless carriers, it also uses the networks of approximately twenty small and medium-sized carriers so that its service is available on a near ubiquitous basis throughout the United States, including offshore locations such as Hawaii, Alaska, Puerto Rico and the U.S. Virgin Islands. TracFone is a mobile virtual network operator or MVNO. Accordingly, TracFone's comments on the state of competition in the CMRS market will be based largely on its perspective as a prepaid provider and as a MVNO.

TracFone's prepaid business model works, and is illustrative of how MVNOs play a significant role in the overall CMRS market. Since commencing operations in 1997, TracFone has grown and continues to grow. Currently, it has more than eight million customers throughout the U.S. Because its customer base consists largely of low volume users, TracFone's average revenue per user (ARPU) is well below that of other CMRS operators. According to industry data, nationally ARPU averages more than $50.00 per month. TracFone's ARPU is approximately $13.00 per month. Despite this low revenue level per customer, TracFone has been able to operate profitably and to consistently grow its business.

Market Structure

As the Commission is well-aware, the trend toward consolidation in the CMRS industry has continued since the Eleventh Competition Report was issued. However, consumers now have choices of service providers which include many MVNOs in addition to licensed network operators. Some MVNOs like TracFone, concentrate on the prepaid market. The prepaid segment of the market operates differently from the traditional post-paid segment in several important respects. One such difference involves service providers' subsidization of handset prices. It is a standard practice for providers of post-paid CMRS services to "buy down" the retail prices for wireless handsets. A provider may sell handsets to consumers for $80 when it purchased the same handsets from its vendors for significantly more. The provider is able to ensure that it will recover the amount of this subsidy by requiring the customer to commit to a service contract of one to two years, subject to early termination penalties. Thus, the provider will be able to recover the amount of the buy down either through assured monthly payments, or through the termination penalties.

Prepaid providers, including TracFone, also subsidize the handsets which they provide to customers. However, they do so with no assurances that they will be able to recover the amount of the subsidy during a contract period (since there are no contracts, no service terms, and no early termination fees). When a prepaid provider sells a handset to a customer for $20, for which it paid $70, it is expecting to recover that amount through subsequent prepaid usage purchases by the customer. With no term commitments, however, the service provider assumes the risk that the customer will make sufficient later purchases to enable the provider to first recover the cost of the handset and a profit thereafter. Therefore, prepaid CMRS services, including that deployed by TracFone, can only succeed if consumers are sufficiently satisfied with the quality of service, ease of use, and price of service, to make those subsequent purchases so that the providers are able to recover their investment in each customer through the handset subsidization.

Another major difference between prepaid business models and post-paid models involves how services are priced and advertised. Unlike post-paid services, prepaid service prices are "fully loaded." That is, the price paid by the consumer at the time of purchase for prepaid airtime is the consumer's total price. For example, if a consumer purchases a TracFone prepaid service for $19.99 which allows for 60 minutes of service, usable over a 90 day period, the consumer will receive 60 minutes of use.[2] He or she will not receive less than 60 minutes of use, nor will he or she pay more than $19.99.[3] This enables consumers to calculate their per minute price by dividing the number of prepaid minutes by the purchase price.

In contrast, post-paid calling plans are not "fully loaded." Carriers offer services at advertised prices (*e.g.*, 400 minutes for $39.95 per month). However, consumers who purchase such plans will be charged more than $39.95 each month. In addition to the advertised price, consumers' invoices will contain such charges as Federal Universal

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[2] This example is provided for illustrative purposes. From time to time, TracFone offers special promotions such as double minutes products.

[3] Some states impose state sales tax which is assessed at time of retail purchase so, even where there are applicable state sales taxes, there are no "after the fact'' surcharges or fees which raise the fully loaded prices of the service beyond what the consumer paid at the time of purchase.

Service Fund charges, state and local telecom taxes, E911 fees, etc. Also not readily apparent to many consumers of such post-paid calling plans is the fact that in general unused minutes do not carry over to succeeding months. Thus, in many cases, for their $39.95 consumers are not purchasing 400 minutes of use. They are purchasing as many minutes as they will use in a month not to exceed 400 minutes. Usage above the 400 minutes provided by the consumer's calling plan are subject to substantial "overage" charges which may greatly increase the consumer's monthly wireless cost beyond the monthly contract price of $39.95. This is not intended as a criticism of CMRS plans which assess such surcharges, taxes and fees, and overage charges in addition to the advertised prices, or which place 30 day limits on purchased usage amounts; rather it is described to illustrate the difference between prepaid and post-paid calling services.

Consumer Behavior

Closely related to the difference between the pricing of prepaid and post-paid CMRS services described above is how consumers perceive and compare the services. CMRS service, like many other products and services, is price elastic. Consumers typically look for the most favorable pricing for services which meet their needs. When a service is advertised at 400 minutes for $39.95, consumers naturally will perceive that they will receive 400 minutes of service for $39.95, even though they will be charged more – often considerably more – than that amount, and even though they will often receive less service. When a prepaid service is advertised at 60 minutes for $19.95 (usable for up to 90 days), consumers will compare that price to the $39.95 price for 400 minutes offered by the post-paid provider. In short, it is common consumer behavior to compare the rates of two dissimilar products and to reach erroneous conclusions as to the comparative prices of each and the value represented by each offering.

State E911 Fees Discriminate Against Low Volume, Low Income Consumers

Virtually all state-imposed E911 fees are flat fees assessed monthly on consumers of CMRS services. Those fees can be as high as $3.00 per month. For example, in West Virginia, CMRS customers are assessed $3.00 per month, irrespective of whether they utilize little CMRS service or a lot of CMRS service. They are required to pay $3.00 per month irrespective of their income level. Since the fees are imposed without regard to consumption and without regard to income levels, the conclusion is inexorable: low volume low income consumers are bearing a disproportionate portion of many states' E911 funding burden.

The discriminatory nature of flat E911 fees is especially pronounced for customers of prepaid CMRS service. For reasons described in elsewhere in these comments, users of prepaid CMRS services tend to be lower income, lower volume consumers. Many consumers of prepaid CMRS services offered by TracFone and others would not have available to them affordable wireless service, but for prepaid service offerings. State-imposed fees which treat those consumers less favorably than they treat higher income larger volume consumers are inconsistent with the universal service principles embodied in the Communications Act,[4] and constitute discriminatory treatment.

[4] See, *e.g.*, 47 U.S.C. § 254.

State Imposition of Taxes and Fees Distorts the Competitive Marketplace

In recent years, there has been a significant increase in state-imposed taxes and fees on wireless services, including prepaid CMRS services. State-imposed fees for E911 service have had an especially distorting impact on the CMRS market. Many states have enacted E911 fees on wireless services. These statutes generally require that the applicable E911 surcharge be stated separately on the consumer's monthly bill. Historically, in the post-paid CMRS environment, these fees (which range from $0.25 per month to $3.00 per month) are simply added to consumer invoices as line item surcharges, on top of the billed contract price. Thus, the surcharges are not included within, or perceived by consumers as being part of, the 400 minutes for $39.95 price.

During the past several years, states have begun focusing attention on collecting similar E911 fees from prepaid wireless customers, despite the fact that, in the case of prepaid CMRS service, there is no periodic billing mechanism which can be used to assess and collect the surcharge. This is so because, by definition, prepaid wireless services do not involve rendering of monthly invoices to consumers. All services are purchased in advance and all charges applicable to those services are paid for at the time of purchase. Importantly, those charges are collected by the entity who sells the prepaid CMRS service to the consumer. For the most part, in prepaid wireless, there is often no direct financial relationship whatsoever between the prepaid wireless service provider and the prepaid wireless consumer. Most retail sales of prepaid wireless services to consumers are made through independent retail vendors, including, *e.g.,* Wal-Mart, Sears, RadioShack and others.

It would logically follow that the entities who sell prepaid CMRS service to consumers would be the ones to collect all fees applicable to those services, including E911 fees, at the time of purchase. In large part, that has not occurred. States have been reluctant to impose E911 fee collection obligations on the retail vendors who actually sell prepaid CMRS service to consumers, despite the fact that it is the retail vendors, not the service providers, who engage in financial transactions with consumers.

Many such states therefore have distorted the true intent of the E911 fee statutes, and have impeded development of competition in the CMRS marketplace by demanding that prepaid CMRS providers pay these fees themselves, irrespective of whether there is any opportunity to collect the fees from customers. In short, those states have "converted" their E911 fees from fees statutorily imposed on <u>consumers</u> based upon consumption of service to fees imposed on service <u>providers</u> based on revenues derived from such service They do so only with respect to prepaid CMRS and do so despite the fact that most state E911 fee statutes clearly state that these are to be charges on consumers, not on providers. They insist that the role of the service provider is to collect the state-imposed fee from the customer and remit the collected amounts to the state regardless of the provider's ability to do so.

Some states have adopted a purported "collection" method commonly known as the Average Revenue Per User or ARPU method for E911 fees. Under the ARPU method, prepaid CMRS providers divide the industry-wide ARPU by their number of customers in that state, multiply the number by the state's per customer E911 fee, and remit that amount to the state's E911 fund each month. In other words, in states where the ARPU method has been deployed, prepaid CMRS providers must contribute E911 fees out of their own pocket, rather than collecting those fees from consumers. Those states typically then contend that the prepaid provider should raise its rates to consumers in those states to incorporate the recovery of the state's fee. By requiring some CMRS providers to collect and remit E911 fees from customers in arrears as line item surcharges while directing other providers to increase their advertised rates and pay the fees themselves, those states are impeding the development of a competitive marketplace for CMRS services. In a competitive CMRS market, prepaid and postpaid CMRS products would compete based on how consumers perceive their service quality, price and suitability for the consumers' needs. That does not occur where state laws and regulations force certain providers to increase their prices relative to those of their competitors, irrespective of those providers' operating efficiencies.

Any state tax or fee assessment system in which some competitors are able to add those taxes and fees to their rates in arrears as unadvertised surcharges, while other providers must either raise their rates to include those taxes or fees or pay the fees themselves out of corporate earnings hardly can be deemed to be "competitively neutral" as required by Section 253(b) of the Communications Act.

TracFone has expended considerable resources and effort working with state legislators, public service commissions, E911 boards, and departments of revenue to find a fair, nondiscriminatory, and competitively neutral solution to the problem of imposition of taxes and fees in general and E911 fees in particular, in the context of prepaid, unbilled, services. One solution to this competitive distortion problem would be to require that, in the case of non-billed services, including prepaid CMRS, such fees be collected at the time of purchase, and that the entity selling the product or service to the consumer bear responsibility for collection of the fee -- as some states require with regard to sales tax on prepaid CMRS sales. Although such point-of-sale proposals are under considerations in various states, to date, few states have mandated such collection and remission methods.

In evaluating the state of competition in the CMRS industry segment, and in preparing the annual report to Congress, TracFone asks the Commission to be mindful of the growing role which MVNOs, including prepaid CMRS providers, play in that market segment, and of the competition-distorting impact being caused by state taxes and fees, including state E911 fees. TracFone further asks that the Commission consider either recommending appropriate legislation to Congress or promulgating rules and policies to ensure that state mechanisms for the funding of E911 service conform with the competitive neutrality requirement of Section 253 of the Communications Act.

Respectfully submitted,

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